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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-
GOMEZ; STEVE KARAGIOSIAN;
ELFEGO RODRIGUEZ; AND JAMAL
CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY
OF BURBANK; AND DOES 1 THROUGH
100, INCLUSIVE.

Defendants.

BURBANK POLICE DEPARTMENT; CITY
OF BURBANK,

Cross-Complainants,

-vs-

OMAR RODRIGUEZ, and Individual,

Cross- Defendant.

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge
Dept. 37

Complaint Filed: May 28, 2009

PLAINTIFF'S SUPPLEMENTAL OPPOSITION
TO DEFENDANT'S MOTION *IN LIMINE* NO.
8 TO EXCLUDE EVIDENCE RE
PROTECTED CLASSES OF WHICH
PLAINTIFF IS NOT A MEMBER

Trial Date: April 25, 2011

1 **I. INTRODUCTION**

2 In its Motion in *Limine* No. 8, Defendant seeks to exclude evidence or argument relating to
3 any protected class of which Plaintiff Cindy Guillen-Gomez is not a member. Defendant's Motion in
4 *Limine* No. 8 should be denied because any and all evidence of harassment, discrimination and
5 retaliation is relevant to Plaintiff's Fifth Cause of Action, based on Defendants' failure to prevent
6 discrimination, retaliation and harassment.

7 **II. DEFENDANT HAS PLACED SUCH ACTS IN ISSUE**

8 In this action for discrimination, harassment and retaliation under California's Fair
9 Employment and Housing Act ("FEHA"), Defendant City of Burbank raised the "avoidable
10 consequences" doctrine as its second affirmative defense, alleging:

11 The employer took reasonable steps to prevent and correct workplace harassment, but
12 Plaintiff(s) unreasonably failed to use the preventative and corrective measures provided by
13 the employer and reasonable use of the employer's procedures would have prevented at least
14 some, if not all, of the harm Plaintiff(s) allege she or he purportedly suffered.

15 (Answer to First Amended Complaint, p.2, ll.11-15.)

16 Such a defense places in issue previous acts of discrimination, harassment and retaliation,
17 whether directed toward Plaintiff or others, and Defendant's responses thereto. In *State Dept. of*
18 *Health Services v. Superior Court* (2003) 31 Cal. 4th 1026, the court explained:

19 [T]o take advantage of the avoidable consequences defense, the employer ordinarily
20 should be prepared to show that it has adopted appropriate antiharassment policies . . . In a
21 particular case, **the trier of fact may appropriately consider** whether the employer
22 prohibited retaliation for reporting violations, whether the employer's reporting and
23 enforcement procedures protect employee confidentiality to the extent practical, and **whether**
24 **the employer consistently and firmly enforced the policy.** Evidence potentially relevant to
25 the avoidable consequences defense includes **anything** tending to show that the employer
26 took effective steps "to encourage victims to come forward with complaints of unwelcome
27 sexual conduct and to respond effectively to their complaints." [*1046] (Grossman, *The*
28 *First Bite Is Free: Employer Liability for Sexual Harassment* (2000) 61 U.Pitt. L.Rev. 671,

696.) “[I]f an employer has failed to investigate harassment complaints, [or] act on findings of harassment, or, worse still, [has] retaliated against complainants, future victims will have a strong argument that the policy and grievance procedure did not provide a ‘reasonable avenue’ for their complaints.” (*Id.* at p. 699.)

(*State Dept. of Health Services, supra*, at pp.1045-1046.)

The court continued:

A conscientious employer will quickly stop the misconduct of which it becomes aware. Prompt employer intervention not only minimizes injury to the victim, but also sends a clear message throughout the workplace that harassing conduct is not tolerated. Employers who take seriously their **legal obligation** to prevent harassment are an employee's best protection against workplace harassment.

(*Id.* at p.1049, emphasis added.)

Thus, under *State Dept. of Health Services*, “the trier of fact may appropriately consider” previous acts of harassment directed both at Plaintiff **and at others**, and Defendant’s responses thereto.

If “[e]vidence potentially relevant to the avoidable consequences defense includes **anything** tending to show that the employer took effective steps ‘to encourage victims to come forward with complaints of unwelcome sexual conduct and to respond effectively to their complaints,” then it follows that relevant evidence also includes **anything** that shows that the employer failed “to encourage victims to come forward with complaints of unwelcome sexual conduct and to respond effectively to their complaints.” This includes evidence of previous acts of harassment toward Plaintiff **and others** and Defendants responses thereto.

Furthermore, one of the policies behind FEHA is to deter future harassment by the same offender or others by prompt effective action. In *Doe v. Starbucks, Inc.* (C.D. Cal. Dec. 18, 2009) 2009 U.S. Dist. LEXIS 118878, the court explained:

Section 12940(k) requires that an employer take all reasonable steps necessary to prevent harassment. In an analogous Title VII situation, the Ninth Circuit has held that “[o]nce an employer knows or should know of harassment, a remedial obligation kicks in. That

1 obligation will not be discharged until action - prompt, effective action - has been taken.
2 Effectiveness will be measured by the twin purposes of ending the current harassment and
3 deterring future harassment - **by the same offender or others.**" Fuller v. City of Oakland, 47
4 F.3d 1522, 1528 (9th Cir. 1995) (citations omitted). "The affirmative and mandatory duty to
5 ensure a discrimination-free work environment requires the employer to conduct a prompt
6 investigation of a discrimination claim." Am. Airlines, Inc. v. Superior Court, 114 Cal. App.
7 4th 881, 890, 8 Cal. Rptr. 3d 146 (2003), reh'g denied and review denied 2004 Cal. App.
8 LEXIS 147 (2004).
9 (*Doe v. Starbucks, Inc.*, *supra*, at pp. 34-35, emphasis added.)

10 This policy to deter future harassment, by the same offender or others by prompt effective
11 action, places in issue whether past instances of harassment, whether directed toward plaintiff or
12 others, were met with prompt effective action. Thus, instances of past harassment directed toward
13 individuals other than Plaintiff, and Defendant's responses thereto, are admissible.

14
15 DATED: April 18, 2011

LAW OFFICES OF RHEUBAN & GRESEN

16
17 By: Steven M. Cischke
18 Steven M. Cischke
19 Attorneys for Plaintiff, Cindy Guillen-Gomez
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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the County of Los Angeles. I am over the age of eighteen and am not a
4 party to the within action. My business address is 15910 Ventura Boulevard, Suite 1610, Encino,
California 91436.

5 On April 18, 2011, I served a copy of the following documents described as: Plaintiff's
6 Supplemental Opposition to Defendant's Motion in Limine No. 8 To Exclude Evidence Re Protected
Classes of Which Plaintiff Is Not A Member on the interested parties, through their respective
attorneys of record in this action as follows:

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16 XX **BY OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or package
17 provided by an overnight delivery carrier and addressed as above. I placed the envelope or
18 package for collection and overnight delivery at an office or a regularly utilized drop box of
the overnight delivery carrier.

19 XX **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an
20 agreement of the parties to accept service by e-mail or electronic transmission, I caused the
documents to be sent to the person(s) at the e-mail address listed above. My electronic
21 notification address is dj@rglawyers.com. I did not receive, within a reasonable time after
the transmission, any electronic message or other indication that the transmission was
22 unsuccessful.

23 XX **STATE:** I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

24 Executed on April 18, 2011 at Encino, California.

25
26 Daphne Johnson